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No. 05-1345

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents concede that this case is "an appropriate vehicle" for addressing "the distinction between public and private beneficiaries [of flow control] under the dormant Commerce Clause." Opp. 2. They further agree with petitioners that this issue is an "important one[]" (*id.*) that "will likely continue to be litigated in the courts" (*id.* at 15). Despite these fundamental concessions, respondents suggest that the Court should deny certiorari for two reasons. First, they assert that the circuit split is "shallow" (*id.* at 15) and that the Sixth Circuit's reasoning is merely "dicta" (*id.* at 14). Second, they argue that the decision below comports with this Court's prior decisions. *Id.* at 5-13. Neither argument supports denial of the petition.

1. Respondents acknowledge that the Sixth Circuit has held – in square contradiction of the decision below – that a flow control ordinance favoring a publicly owned facility discriminates against interstate commerce and is subject to strict scrutiny under *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). See *National Solid Waste Mgmt. Ass'n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006). Respondents argue, however, that there is "[n]o [t]rue [c]onflict" between *Daviess* and the decision below because the Sixth Circuit's disagreement with the Second Circuit's reading of *Carbone* was "dicta." Opp. 13-14.

There is no merit to this contention. As respondents point out (Opp. 13), before *Daviess*, the Sixth Circuit applied strict scrutiny to flow-control measures favoring publicly owned facilities and thus implicitly rejected the public/private distinction adopted below. See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 716 (6th Cir. 2000); *Waste Mgmt., Inc. v. Metro. Gov't of Nashville & Davidson Counties*, 130 F.3d 731, 736 (6th Cir. 1997). But in none of

the cases did it directly address the issue. In *Daviess*, the County squarely raised the issue – invoking the Second Circuit's decision in this case as support – and the Sixth Circuit in turn squarely rejected the Second Circuit's decision. 434 F.3d at 909-912. Because doing so was absolutely necessary to its resolution of the issue presented to it, the Sixth Circuit's reasoning is not dicta – even if the court was obliged by earlier cases to rule as it did. Indeed, if the Sixth Circuit was bound by prior rulings to reject the public/private distinction, that simply means that the circuit split we have identified pre-dates the *Daviess* decision. It does not mean that there is no split at all.

Respondents next suggest that review is premature because "the *Daviess* court * * * was not informed of the subsequent decision rendered by the Second Circuit in *United Haulers II*, made with the benefit of a more complete record and thoughtful analysis by the lower court." Opp. 15. In *United Haulers II*, however, the Second Circuit confined its analysis to whether the flow control provisions were invalid under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and thus examined only whether they imposed burdens on interstate commerce that were "clearly excessive in relation to the putative local benefits." Pet. App. 7a (quoting *Pike*, 397 U.S. at 142). The court "reaffirm[ed]" (Pet. App. 15a), but did not revisit, its ruling in *United Haulers I* that flow-control ordinances favoring public facilities do not discriminate against interstate commerce under *Carbone*. Pet. App. 3a ("In this case, we are called upon to decide whether a nondiscriminatory flow control regulation * * * violates the dormant Commerce Clause"). Accordingly, the opinion in *United Haulers II* does not illuminate the question whether flow-control measures favoring public facilities should be

subject to strict scrutiny. The decision thus would have been of no interest to the court in *Daviess*.[1]

Respondents also argue that the Court should deny review because the split among the circuits is "shallow." Opp. 15. They suggest that the Court may benefit from permitting the issue presented to further "percolat[e]" in the lower courts before resolving it. *Id.* This argument is weightless. Respondents concede that the issue presented is a recurring one that will have to be litigated repeatedly in the trial and appellate courts until this Court resolves it. *Id.*; see also Br. of *Amicus Curiae* Am. Trucking Ass'ns, Inc. and Nat'l Solid Wastes Mgmt. Ass'n in Support of the Petitioners ("ATA/NSWMA Am. Br.") at 5-6. They also concede that "the record and reasoning" in *this* case makes it "suitable for review, should the Court wish to address the public/private distinction without further delay." Opp. 16. Respondents cannot deny that, between them, the Second and Sixth Circuits have fully explored all aspects of this issue. There is no reason to think that waiting for other Circuits to weigh in will either obviate the need to resolve the conflict or frame the arguments any better than they are already framed.

Any marginal benefit that might be gained by waiting for other inferior courts to weigh in on these issues, moreover, is more than outweighed by the cost of continued uncertainty

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[1] The lower court's ruling on remand also focused exclusively on application of the *Pike* balancing test. See Pet. App. 68a ("[T]he Second Circuit has already deemed the flow control ordinances in this case nondiscriminatory on their face and therefore subject to *Pike*."). Indeed, respondents successfully contended below that the lower court was bound by the terms of the remand to consider only the *Pike* balancing test and could not revisit the question whether strict scrutiny should be applied. See Pet. App. 89a ("[T]his court is duty bound to faithfully comply with that court's narrow and quite specific directive.").

regarding the constitutionality of these widespread measures. As the Second Circuit stated in *United Haulers I* – in a passage quoted by respondents (Opp. 8-9) – the "missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement." Pet. App. 32a. Private waste companies also must resort to this difficult "guesswork" when making long-term investments in the development of waste-processing facilities. See ATA/NSWMA Am. Br. at 6. Meanwhile, the continuation of this form of flow control in the Second Circuit and elsewhere threatens long-term damage to the interstate waste management system, which will become more serious the longer the rule established by the decision below persists. See *id.* at 10-14. These factors counsel strongly in favor of resolving the issues presented now.

As the Second Circuit has observed, the federal docket has long been "clogged with – of all things – garbage." *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 504-505 (2d Cir. 1995). This Court and the lower courts already have devoted substantial resources to evaluating the constitutionality of various waste-management measures under the Commerce Clause. This case presents the opportunity for this Court to address one of the most significant remaining open questions regarding the constitutionality of waste-management schemes. The Court should take this opportunity to fill in this important "missing piece[] to the constitutional puzzle" (Pet. App. 32a) without delay.

2. The remainder of respondents' opposition is devoted to arguing that the Second Circuit correctly applied *Carbone* and *Pike*. Opp. 5-13. The petition explains our contrary view that the decisions below conflict with those and other prior rulings of this Court. See Pet. 16-23, 28-30. The *Daviess* opinion and the amicus brief filed in support of the petition (at 15-19) further address the illogic of the public/private

distinction adopted below. Given respondents' concession that this case is a good vehicle for resolving a recurring and important issue regarding the constitutionality of flow control, this Court need not reach the merits of these questions in order to conclude that review is appropriate here. Accordingly, we will not attempt a general response to respondents' merits arguments in this reply brief.

Two of respondents' arguments do merit immediate refutation, however. First, respondents suggest that the Second Circuit's discussion of its findings under *Pike* demonstrates that the ordinances would be upheld even if they were found to discriminate against interstate commerce. Opp. 12-13 & n.3. In fact, it is inconceivable that the flow-control ordinances at issue in this case could survive strict scrutiny. That "virtually *per se* rule of invalidity" (*City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)) is satisfied only "[i]n the rare case where a court finds the local interest compelling and the alternatives [to the discriminatory regulation] non-existent." Pet. App. 37a. Given that hundreds of local governments throughout the country successfully provide waste disposal services and promote waste reduction and recycling while encouraging rather than restricting interstate commerce in waste-related services, respondents cannot hope to show that they have "no other means to advance" their legitimate interests except through protectionist measures. *Carbone*, 511 U.S. at 392.

Respondents also suggest that we argue for a "blanket *per se* prohibition of flow control laws of all kinds." Opp. 1. That is not true. As we note in the petition, for example, flow-control measures have been held not to discriminate against interstate commerce if they provide an exemption for waste destined for out-of-state disposal. See Pet. 24 & n.9. Other types of flow control also may be constitutional. Because the flow-control measures at issue here are functionally indistinguishable from the ordinance invalidated in *Carbone*, however, they plainly violate the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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